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No. 126

In the Supreme Court of the United States

OCTOBER TERM, 1960

LAURENS FEDERAL SAVINGS AND LOAN ASSOCIATION, PETITIONER

v.

SOUTH CAROLINA TAX COMMISSION, AND OTIS W. LIVINGSTON, CHAIRMAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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Pursuant to Rule 42(4) of the Rules of this Court, the Solicitor General, on behalf of the United States, as *amicus curiae,* urges that the petition for a writ of certiorari in this case be granted.

Petitioner, a Federal Savings and Loan Association, executed and delivered to the Greensboro Federal Home Loan Bank a number of promissory notes for advances received from the Bank. The question is whether those notes were subject to the South Carolina documentary stamp tax or were exempt under 12 U.S.C. 1433 (§ 13, Federal Home Loan Bank Act, 47 Stat. 725, 735), which provides that "The

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bank [a Federal Home Loan Bank], including its franchise, its capital, reserves, and surplus, its advances, and its income shall be exempt from" state taxes. The Supreme Court of South Carolina held that the notes were taxable.

1. The decision below is contrary in principle to the decision of this Court in *Pittman* v. *Home Owners' Loan Corp.*, 308 U.S. 21. In that case the Court held that mortgages given to the Home Owners' Loan Corporation to secure loans from the Corporation were exempt from a state recordation tax under a statute providing that "The Corporation, including its franchise, its capital, reserves and surplus, and its loans and income, shall * * * be exempt from" state taxes (§ 4(c), Home Owners' Loan Act of 1933, 48 Stat. 130). The exemption of "loans" was construed "as covering the entire process of lending, the debts which result therefrom and the mortgages given to the Corporation as security" (308 U.S. at 31). The exemption provision in this case is substantially identical to that involved in *Pittman* except for the use of the word "advances" instead of "loans". That difference is insignificant, and just as the exemption of "loans" in *Pittman* was held to extend to the mortgages required to secure the loans, so must the exemption of "advances" be held to extend to the notes required to evidence the advances.

Nor can *Pittman* be distinguished, as the court below suggests, on the ground that the tax there was sought to be collected from the Corporation rather than, as here, from the borrower. The Court in

Pittman expressly rejected an analogous argument[1] and held it to be immaterial which party to the loan paid the tax, for "whoever pays it it is a tax upon the mortgage and that is what is forbidden by the law" (308 U.S. at 31).[2]

2. The question presented is of substantial and continuing importance. At least two other states have taxing statutes similar to South Carolina's (see 72 Pa. Stat. Ann. (Purdon 1949) §§ 203(p), 3250–10; Fla. Stat. (1959) § 201.08), and the decision

[1] That the tax was not imposed on the Corporation as such but only on the privilege of recording the mortgage, and was in fact customarily paid by the mortgagor. See 308 U.S. at 22, 30–31.

[2] The court below also relied on 12 U.S.C. 1464(h) (§ 5(h), Home Owners' Loan Act of 1933), which forbids state taxes on Federal Savings and Loan Associations greater than those imposed on other similar institutions. As we read its opinion, however, the court relied on that provision, not as an exception to the statutory exemption granted by 12 U.S.C. 1433, but only as impliedly recognizing the power of the states to tax the associations in the absence of express exemptions—*i.e.*, as a waiver of any constitutional immunity the associations might have as federal instrumentalities. So also we do not understand respondents to rely on § 1464(h) for any purpose other than to establish that the notes are subject to nondiscriminatory state taxes if they are not within the statutory exemption granted by § 1433. Petitioner, on the other hand, relies exclusively on § 1433, and does not argue that it is a "federal instrumentality" constitutionally immune from state taxation even apart from § 1433 (see Pet. 11, n. 9). Hence the controlling question is the interpretation of § 1433, and on that question the *Pittman* case is, we believe, dispositive.

Since the question whether petitioner is a constitutionally-immune federal instrumentality (and the subordinate question whether, if so, § 1464(h) is a waiver of that immunity) is not argued by petitioner, we do not discuss it.

below may prompt other states to adopt like legislation. Such taxes impose a substantial burden on the operations of the Federal Home Loan Banks and the Federal Savings and Loan Associations and to that extent tend to undermine the Congressional purpose to promote financially-sound, low-cost home financing institutions.

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for certiorari should be granted.

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JULY 1960.

U.S. GOVERNMENT PRINTING OFFICE 1960

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OPINIONS BELOW

The opinion and judgment of the Court of Common Pleas of Laurens County (R. 8–11) is unreported. The opinion of the Supreme Court of South Carolina (R. 15–23) is reported at 112 S.E. 2d 716.

JURISDICTION

The judgment of the Supreme Court of South Carolina was entered on February 5, 1960, and a timely petition for rehearing was denied on February 26, 1960 (R. 13–15). By order of the Chief Justice dated May 2, 1960, the time for filing a petition for writ of certiorari was extended to June 4, 1960 (R. 23–24).

A petition was timely filed on June 3, 1960, and was granted on October 10, 1960 (R. 24). Jurisdiction is conferred on this Court by 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether the imposition of a state stamp tax on promissory notes made by a Federal Savings and Loan Association to evidence loans from a Federal Home Loan Bank is barred by a federal statute exempting from state taxation advances by federal home loan banks.

STATUTES INVOLVED

The relevant portions of Sections 9, 10, and 13 of the Federal Home Loan Bank Act, c. 522, 47 Stat. 725, 12 U.S.C. Chap. 11; Sections 2 and 5 of the Home Owners' Loan Act of 1933, c. 64, 48 Stat. 128, 12 U.S.C. Chap. 12, and Sections 65–681 and 65–688, 6 Code of Laws of South Carolina (1952), are set forth in the Appendix, *infra*, pp. 13–16.

STATEMENT

The Federal Home Loan Bank Act, c. 522, 47 Stat. 725, established a system of federally chartered home loan banks to advance funds to eligible local organizations upon security of mortgages on homes. The Home Owners' Loan Act of 1933, c. 64, 48 Stat. 725, further implemented the congressional purpose of encouraging home ownership by providing for the establishment of Federal Savings and Loan Associations as "local mutual thrift institutions in which people may invest their funds" and thus facilitate "the financing of homes". Section 5(a), Home Owners' Loan Act of 1933 (12 U.S.C. 1464(a)). By law, such associations become "members" of the Federal Home Loan Bank

in the district in which they are located (Section 5(f), Home Owners' Loan Act of 1933 (12 U.S.C. 1464(f)) and the statute provides that advances by a federal home loan bank to its members "shall be made upon the note or obligation of the * * * borrower" (Section 10(c), Federal Home Loan Bank Act (12 U.S.C. 1430(c), Appendix, *infra*, p. 13). The entire system is supervised and administered by the Federal Home Loan Bank Board, which is appointed by the President. Section 17, Federal Home Loan Bank Act (12 U.S.C. 1437).

With respect to state taxation, Section 13 of the Federal Home Loan Bank Act (12 U.S.C. 1433, Appendix, *infra*, pp. 13–14) exempts the home loan bank and "its advances" from "all taxation" by "any State." Section 5(h) of the Home Owners' Loan Act of 1933 (12 U.S.C. 1464(h), Appendix, *infra*, pp. 14–15) prohibits any state taxation of federal savings and loan associations which is greater than that levied on local mutual thrift institutions.

There is no dispute concerning the operative facts. The petitioner is a properly chartered Federal Savings and Loan Association in Laurens, South Carolina, and is a member of the Federal Home Loan Bank of Greensboro, North Carolina (R. 16). Between August 12, 1953, and January 3, 1958, the petitioner obtained ten advances from the Home Loan Bank of Greensboro in the aggregate amount of $5,675,000 and executed a promissory note for each of the ten advances (R. 7, 15–16).

The respondent assessed a documentary stamp tax of $2,270 against the petitioner under a state statute

imposing a stamp tax on promissory notes of 4 cents on each $100 or fractional part thereof. 6 Code of Laws of South Carolina, Section 65–688 (1952), Appendix, *infra*, pp. 15–16. The petitioner paid this tax under protest (R. 6) and brought a timely suit to recover the amount so paid. The Court of Common Pleas of Laurens County and the Supreme Court of South Carolina upheld the assessment.

INTEREST OF THE UNITED STATES

The Federal Home Loan Bank System and the Federal Savings and Loan Associations, which are members thereof, are under the supervision and control of the Federal Home Loan Bank Board, and are the instrumentalities chosen by Congress to execute a program of promoting public thrift and widespread home ownership. State taxation of the promissory notes given for advances to Federal Savings and Loan Associations by the Federal Home Loan Bank System is in violation of the express exemption provided by Congress and impairs the national policy. The Federal Government has an interest both as the administrator of, and an investor in, the System.

SUMMARY OF ARGUMENT

At issue here is the breadth of the exemption from state taxation of "advances" made by Federal Home Loan Banks to Federal Savings and Loan Associations. Under the statutory scheme it is the function of Federal Home Loan Banks to make advances to its members, such advances to be secured by home mortgages and the borrower's promissory note. According to the statute, such "advances" are to be free

from state taxation. 12 U.S.C. 1433, Appendix, *infra*, pp. 13–14.

Here the State of South Carolina is attempting to levy a documentary stamp tax on the promissory notes made by the petitioner, a Federal Savings and Loan Association, in favor of the Federal Home Loan Bank of Greensboro, North Carolina, of which it was a member.

Contrary to the approach of the courts below, this Court has previously indicated that such statutory exemptions are to be construed to effectuate the congressional purpose. *Pittman* v. *Home Owners' Loan Corp.*, 308 U.S. 21, held that the exemption of "loans", in an analogous provision, prevented a state from imposing a tax on mortgages offered for record by the Federal Home Owners' Loan Corporation. That case held that it did not matter whether the tax on the transaction was collectible from the borrower or the lender for it still constituted a prohibited tax on the loan.

So here, the fact that South Carolina is attempting to collect the tax from the petitioner, rather than the Home Loan Bank of Greensboro, has no substantive bearing on the issue, for the tax is still one on the advance exempted by Congress from state taxation.

The reliance of the South Carolina Supreme Court on Section 5(h) of the Home Owners' Loan Act of 1933 (12 U.S.C. 1464(h), Appendix, *infra*, pp. 14–15), providing that the states shall not tax Federal Savings and Loan Associations more than similar local organizations, is misplaced. That provision simply pro-

hibits discriminatory taxation of federal associations. While this implies congressional recognition that non-discriminatory state taxation of such associations is possible, it cannot be read as modifying the exemption from taxation of the "advances" of a Federal Home Loan Bank. It simply means that, to the extent state taxation is permitted by law, it must be uniform.

The South Carolina documentary stamp tax is clearly within the statutory exemption and the courts below erred in permitting its collection.

ARGUMENT

THE IMPOSITION BY SOUTH CAROLINA OF A DOCUMENTARY STAMP TAX UPON PROMISSORY NOTES ISSUED BY A BORROWING FEDERAL SAVINGS AND LOAN ASSOCIATION IN RETURN FOR A LOAN MADE BY A FEDERAL HOME LOAN BANK INFRINGES THE EXPRESS EXEMPTION FROM STATE TAXATION GRANTED BY CONGRESS TO ADVANCES MADE BY FEDERAL HOME LOAN BANKS

Under the statutory plan the primary function of a Federal Home Loan Bank is to advance funds to eligible organizations and to require the borrowers to execute promissory notes for such advances.[1] Here it is undisputed that the Federal Home Loan Bank of Greensboro, North Carolina, made ten advances to the petitioner, which, as a federal savings and loan association, was a member of the Bank, and that the petitioner made and delivered ten promissory notes to the Bank covering such advances. (R. 15-16.)

---

[1] Section 10, Federal Home Loan Bank Act (12 U.S.C. 1430), Appendix, *infra*, p. 13.

Congress has exempted such transactions from both state and federal taxation by providing in Section 13 of the Federal Home Loan Bank Act (12 U.S.C. 1433), Appendix, *infra*, pp. 13–14):

> The bank, including its franchise, its capital, reserves, and surplus, *its advances*, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or *by any State*, county, municipality or local taxing authority * * *.[2] [Emphasis added.]

The application of this statutory exemption may not be avoided, as the court below considered (R. 18), by construing this exemption as prohibiting only those state taxes assessed against Federal Home Loan Banks. This Court has consistently construed similar exemption statutes as precluding state taxation of all facets of the exempt activity even though the initial impact of a particular tax may be shifted from the federal instrumentality. See, e.g., *Federal Land Bank* v. *Crosland*, 261 U.S. 374; *Federal Land Bank* v. *Bismarck Co.*, 314 U.S. 95; *Carson* v. *Roane-Anderson Co.*, 342 U.S. 232. Cf. *United States* v. *Allegheny County*, 322 U.S. 174, 186.

Closely in point is *Pittman* v. *Home Owners' Corp.*, 308 U.S. 21, where a virtually identical statutory exemption was considered. There, Maryland attempted to levy a documentary tax on a mortgage required by the federal statute as security for a loan made by the Home Owners Loan Corporation.[3] The Maryland

[2] The provision goes on to except state and local real estate taxes from this exemption.

[3] A now abolished subsidiary of the Home Loan Bank Board.

statute levied a tax on every mortgage at the rate of ten cents for each $100 of the principal amount of the debt to be collected when the mortgage was recorded or offered for record. The applicable federal statute (Sec. 4(c), Home Owners' Loan Act of 1933) prohibited state taxation of Home Owners Loan Corporation "loans", and this Court held (p. 31) that the "manifest purpose" of this "broad exemption" covered "the entire process of lending, the debts which result therefrom and the mortgages given to the Corporation as security."

We submit that under the same reasoning the petitioner is exempt from the South Carolina tax. The statute here specifically exempts the "advances"—a term contextually synonymous with the "loans" considered in *Pittman*. The execution of a note by a member of a Federal Home Loan Bank in return for an advance is just as much a part of the Bank's "lending function" as was the recordation of a mortgage by the Home Owners Loan Corporation. As an integral and required part of the process of obtaining an advance, the note is as exempt as any other phase of this procedure.

The court below thought that *Pittman* was distinguishable because the State was not seeking to collect the tax from the Bank (as it was from the Home Owners Loan Corporation in *Pittman*), but from the petitioner association.[4] This implies, erroneously we

[4] It is not clear from the South Carolina statute whether the tax on promissory notes must be paid by the payor or the payee. The tax is levied on the maker of a note or one for whose use or benefit the instrument is made. 6 Code of Laws of South Carolina, Sec. 65-681 (1952), Appendix, *infra*, p. 15.

believe, that the mode of collection adopted by a state determines whether a particular tax is within or without the congressional ban. As this Court has twice said, however, "whoever pays it it is a tax upon the mortgage [here the advance] and that is what is forbidden by the law of the United States." *Federal Land Bank* v. *Crosland, supra*, pp. 378, 379; *Pittman* v. *Home Owners' Corp., supra,* p. 31.

In matters of substance the South Carolina taxing act is much like the one involved in *Pittman*. It imposes a general tax on the advancing or lending of money through the convenient means of requiring purchase of revenue stamps to be affixed upon the documents evidencing the indebtedness.[*] Moreover, the amount of the tax is measured by the amount of the advance, viz., four cents for each one hundred dollars or fractional part thereof. Paraphrasing the descriptive language of the opinion in *Pittman* (p. 31), the tax is imposed on the advance and is graded according to the amount of the loan and the condition of affixing revenue stamps to the note securing the advance is a practical method of collection.

The court below also felt that a result contrary to *Pittman* was justified here because of the language of Section 5(h) of the Home Owners' Loan Act of 1933 (12 U.S.C. 1464(h), Appendix, *infra,* pp. 14–15) which prohibits states from taxing Federal Savings

[*] Thus, the stamps are required for all promissory notes, written obligations to pay money, assignments of salaries, mortgages which incorporate a certificate of indebtedness, etc., and on each renewal of such documents. 6 Code of Laws of South Carolina (1952), Sec. 65-688 (Appendix, *infra*, pp. 15–16).

and Loan Associations to a greater extent than similar locally chartered organizations. The court read this as an affirmative sanction of non-discriminary state taxation under which the South Carolina stamp tax could be justified. While it is true that by prohibiting discriminatory taxation of Federal Savings and Loan Associations the statute impliedly allows non-discriminatory levies upon them, it does not follow that Congress took this circuitous way of permitting taxation of the very "advances" by Home Loan Banks which it had specifically exempted. Indeed, the scheme of the statute and the reading together of the two Acts require a contrary conclusion. The petitioner is not attempting in this action to assert any general federally-created immunity from state taxes, but is merely claiming that the State cannot collect a tax which in substance is imposed on advances from the Home Loan Bank. Thus, the question here is not whether Federal Savings and Loan Associations are exempt from all state taxes, but whether advances made to such associations by Federal Home Loan Banks may be exempted from state taxation, as Congress has commanded.

The implication in Section 5(h) of the Home Owners Loan Act of 1933 (12 U.S.C. 1464(h)) that the states have the power to levy non-discriminatory taxes on Federal Savings and Loan Associations must be qualified by the express limitation of the power of the states to tax the advances of Federal Home Loan Banks.

In its brief in opposition to certiorari (pp. 4–5), the respondent contended that exemption of Federal

Savings and Loan Associations from the tax on notes would discriminate against state-chartered associations. It is not at all clear that, insofar as they borrow from Federal Land Banks, as many of them may, state institutions will not also be free of the tax on notes given for such advances. If under some circumstances the state tax does create an undesirable competitive situation, the ready remedy lies with the legislature which imposed it rather than in an attack on the exemption granted by federal law.

This Court has repeatedly held that the congressional power to immunize legislative programs from state taxation extends beyond the intergovernmental immunity implied from the Supremacy Clause of the Constitution. Indeed, this power includes whatever is "necessary and proper" to the implementation of its constitutional functions. Constitution, Art. 1, Sec. 8, par. 18; *Pittman* v. *Home Owners' Corp., supra; Federal Lank Bank* v. *Crosland, supra; Stewart & Co.* v. *Sadrakula,* 309 U.S. 94, 103; *Ex parte Bransford,* 310 U.S. 354; *Federal Land Grant* v. *Bismarck Co.,* 314 U.S. 95, 102; *Dameron* v. *Brodhead,* 345 U.S. 322, 325–327; *Carson* v. *Roane-Anderson Co.,* 342 U.S. 232. Unquestionably, creating the Federal Home Loan Bank system was a proper exercise of congressional power and "the power to create implies a power to preserve." *McCulloch* v. *Maryland,* 4 Wheat. 316, 426. The exemption of the process of advancing money between two federally-endowed organizations is a "necessary and proper" exercise of that power.

CONCLUSION

For the reasons stated, the judgment of the Supreme Court of South Carolina should be reversed.

Respectfully submitted.

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JANUARY 1961.

APPENDIX

Federal Home Loan Bank Act, c. 522, 47 Stat. 725:

SEC. 9. Any member or nonmember borrower of a Federal Home Loan Bank shall be entitled to apply in writing for advances. Such application shall be in such form as shall be required by the Federal Home Loan Bank with the approval of the board. Such Federal Home Loan Bank may at its discretion deny any such application, or, subject to the approval of the board, may grant it on such conditions as the Federal Home Loan Bank may prescribe. (12 U.S.C. 1429.)

SEC. 10. * * *

* * * * * *

(c) Such advances shall be made upon the note or obligation of the member or nonmember borrower secured as provided in this section, bearing such rate of interest as the board may approve or determine, and the Federal Home Loan Bank shall have a lien upon and shall hold the stock of such member as further collateral security for all indebtedness of the member to the Federal Home Loan Bank. * * *
(12 U.S.C. 1430.)

SEC. 13. Any and all notes, debentures, bonds, and other such obligations issued by any bank, and consolidated Federal Home Loan Bank bonds and debentures, shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The

bank, including its franchise, its capital, reserves, and surplus, its advances, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that in any real property of the bank shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed. The notes, debentures, and bonds issued by any bank, with unearned coupons attached, shall be accepted at par by such bank in payment of or as a credit against the obligation of any home-owner debtor of such bank.

(12 U.S.C. 1433.)

Home Owner's Loan Act of 1933, c. 64, 48 Stat. 128:

SEC. 2. As used in this Act—

* * * * *

(d) The term "association" means a Federal Savings and Loan Association chartered by the Board as provided in section 5 of this Act.

(12 U.S.C. 1462.)

* * * * *

SEC. 5(h) [as amended by Sec. 909, Social Security Act Amendments of 1939, c. 666, 53 Stat. 1360, and Sec. 313(d) of the Revenue Act of 1951, c. 521, 65 Stat. 452] Such associations, including their franchises, capital, reserves, and surplus, and their loans and income, shall be exempt from all taxation now or hereafter imposed by the United States (except the taxes imposed by sections 1410 and 1600 of the Internal Revenue Code with respect to wages paid after December 31, 1939, for employment after such date, and except, in the case of taxable years beginning after December 31, 1951, income, war-profits, and excess-profits taxes) and all shares of such associa-

tions shall be exempt both as to their value and the income therefrom from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States; and no State, Territorial, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions.

(12 U.S.C. 1464.)

6 Code of Laws of South Carolina (1952):

ARTICLE 2.

Documentary Stamp Tax.

§ 65–681. *Imposition.*

There shall be levied, collected and paid for and in respect of the several bonds, debentures or certificates of stock and indebtedness and other documents, instruments, matters and things mentioned and described in §§ 65–682 to 65–684 and §§ 65–688 to 65–690 or for or in respect of the vellum, parchment or paper upon which such instrument, matter or thing, or any of them, are written or printed by any person who makes, signs, issues, sells, removes, consigns or ships them or for whose benefit or use they are made, signed, issued, sold, removed, consigned or shipped the several taxes specified in said sections.

1942 Code § 2521; 1932 Code § 2521; 1928 (35) 1089.

* * * * * *

§ 65–688. *Notes, mortgages; assignments of wages, etc.*

The tax on promissory notes, except bank notes issued for circulation and executory contracts for the payment of money which are

executed or carried out in an instrument of writing to which documentary stamps are affixed, non-negotiable notes, written obligations to pay money, except as may otherwise be provided for in this chapter, assignments of salaries, wages or other compensation and mortgages which incorporate the certificate of indebtedness not otherwise shown in a separate instrument, and each renewal of any thereof, shall be for a sum not exceeding one hundred dollars, four cents and for each additional one hundred dollars, or fractional part thereof, four cents.

1942 Code § 2525; 1932 Code § 2525; 1928 (35) 1089; 1932 (37) 1378.